Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN M. McGUINNESS,
Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF NEW MEXICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DENNIS W. MONTOYA
LAW OFFICES OF DENNIS W. MONTOYA
P.O. Box 15235
Rio Rancho, NM 87174-0235
(505) 246-8499
(505) 246-8599 (Facsimile)
Attorney for Petitioner

6938

QUESTIONS PRESENTED

- Whether, where a claim of disability non-accommodation is determined ultimately to be without merit, the doctrine of res judicata should bar separate litigation by an individual alleging denial of due process in the investigation of his discrimination claims.
- Whether, for purposes of application of the doctrine of res judicata, a University discrimination complaint investigation unit is in privity with the University division alleged to have committed discriminatory acts, and which the discrimination complaint investigation unit is required to investigate.
- Whether the Tenth Circuit Court of Appeals erred when it failed to conclude that the University of New Mexico, an agency of the State, may not assert privity on procedural due process issues where that State's actors are alleged to have used their privity to deprive Dr. McGuinness of his constitutional rights?
- Whether the Tenth Circuit Court of Appeals erred when it failed to consider Dr. McGuinness' allegations that he was deprived by the State of New Mexico of his right to use the University of New Mexico's established adjudicatory procedure to resolve his procedural due process claims, where the University's procedures were the only effective remedy under the specific circumstances?

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The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in Appendix A beginning at p. I. The decision of the United States District Court for the District of New Mexico is set forth in Appendix B beginning at p. VII.

STATEMENT OF JURISDICTION

On July 28, 1998, the United States District Court for the District of New Mexico granted summary judgment in favor of Respondent. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. On May 24, 1999, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's granting of summary judgment. This court has jurisdiction to review the case under 28 U.S.C. §1254.

STATUTES INVOLVED

42 U.S.C §12212 (Alternative Means of Dispute Resolution) provides:

Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

42 U.S.C §12112 ("Discrimination") provides:

- (a) General rule No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

- (b) Construction As used in subsection (a) of this section, the term "discriminate" includes –

  - (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

  - (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an

employee of the covered entity, or an organization providing training and apprenticeship programs);

- (3) utilizing standards, criteria, or methods of administration

- (A) that have the effect of discrimination on the basis of disability; or

- (B) that perpetuate the discrimination of others who are subject to common administrative control;

- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

- (5)
  - (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

- (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. §12132 of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. "

STATEMENT OF THE CASE

This is an appeal from the dismissal of Plaintiff's claims by the trial court. The Memorandum Opinion and Order was filed on July 28, 1998. Appellant's Notice of Appeal was thereafter timely filed on August 26, 1998.

Appellant filed suit on April 2, 1997, alleging violation of the Americans With Disabilities Act and the Rehabilitation Act of 1973 by the University of New Mexico (UNM) Equal Opportunity Program (EOP) in connection with multiple procedural improprieties on the part of the UNM EOP Office;

Defendants filed their "Motion for Immediate Dismissal" on the grounds of Res Judicata on August 5, 1997. This Motion, duly responded to by Dr. McGuinness, was based on the doctrine of res judicata arising from the trial court's prior adjudication in McGuinness vs.

University of New Mexico School of Medicine, USDCNM No. 95-1434 MV/LFG.

On 28 July 1998, the trial court entered its Memorandum Opinion and Order (Attached as Appendix B) dismissing Dr. McGuinness' case on the grounds of res judicata. This appeal followed.

Dr. McGuinness timely appealed the decision of the District Court. The 10th Circuit Court of Appeals affirmed on May 24, 1999. (Tenth Circuit Opinion attached as Appendix A) This petition for a writ of certiorari to the 10th Circuit Court of Appeals follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TRIAL COURT ERRED IN ITS ANALYSIS THAT THE INSTANT CASE FORMS PART OF THE SAME TRANSACTION AS DR. McGUINNESS' EARLIER LITIGATION

Dr. McGuinness initiated the instant lawsuit to vindicate his rights to have a proper investigation conducted on his complaint, and to be free from retaliation for bringing that complaint, as established pursuant to the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.* (as amended); and the Rehabilitation Act of 1973, 29 U.S.C. §794 (as amended). The complaint in the case now before the court arises from acts and omissions that are separated in time and nature from the acts and omissions complained of in the other litigation relied upon by the Defendants. The parties alleged to have violated the Plaintiff's rights are not the same as the University of New Mexico School of Medicine, the sole party named in the litigation brought in the prior case.

The nature of the interest sought to be protected is entirely different in this case from the interest in Dr. McGuinness' first litigation. In McGuinness I, the Plaintiff sought to show that the University of New Mexico School of Medicine failed to accommodate his disability. In McGuinness II, the Plaintiff seeks to demonstrate

that the University of New Mexico Equal Opportunity Programs Office retaliated against him by depriving him of due process and a meaningful right to be heard. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 102 S.Ct. 1148, 1150-1155, ____ L.Ed.2d ____ (1981) (the right to use administrative adjudicatory procedures is a species of property protected by the Due Process Clause); Parratt v. Taylor, 451 U.S. 527, 541 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981) (To show a failure of due process, a plaintiff might show that state procedures as written do not supply basic due process or that state officials acted in a "random and unauthorized" fashion in depriving the plaintiff of his protected interest.) The United States Department of Education, in ruling that Dr. McGuinness had been discriminated against when the UNM EOP Office refused, initially, to investigate Appellant's claims at all, recognized the separate right to a meaningful opportunity to participate in the administrative hearing process as separate and apart from the possible merits of the claim to be asserted in that process. (See Appendix C)

The right to a meaningful hearing and to participate in administrative alternative dispute resolution mechanisms is echoed in the structure of the Americans With Disabilities Act, itself. (See, 42 U.S.C §12212 (Alternative Means of Dispute Resolution)) Interference with the right to file a charge, testify, assist, or participate in any

manner in an investigation, hearing, or proceeding under the Americans With Disabilities Act is prohibited. (See EEOC Enforcement Guidance: Nonwaivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes, Issued May 2, 1997)

These issues were not decided in the prior litigation, nor should they have been brought before the trial court in that case. Because of the separation of actors and events, because of the separation of causal elements giving rise to the two litigations, and because of the entirely different interests sought to be protected, the facts underlying the two cases do NOT form a "convenient trial unit" as required by the doctrine of res judicata. The claims in this lawsuit are NOT "the same or nearly the same" as those brought before the Court in the other litigation. A judicial finding that Plaintiff's condition is not a "disability" within the meaning of the ADA and the Rehabilitation Act is without effect as regards Plaintiff's right to have his complaint investigated and to be free from retaliation as a result of bringing that complaint. Newly discovered evidence of continuing retaliation means that the "full and fair opportunity" to litigate requirement for application of case and issue preclusion has not been met. Defendants' motion, brought pursuant to the doctrine of res judicata, was therefore without merit and should have been denied.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE "IDENTITY OF THE PARTIES" PRONG OF THE RES JUDICATA INQUIRY FAILS, AND DR. McGUINNESS SHOULD HAVE BEEN ALLOWED TO SEPARATELY LITIGATE HIS SEPARATE CLAIMS

There is no identity of the parties between this case and the case previously decided by District Judge Vázquez. Different University of New Mexico entities are named in the two litigations. The original case before the trial court named only the University of New Mexico School of Medicine. The case presently before the court does not name the University of New Mexico School of Medicine, or any official of the University of New Mexico School of Medicine, as defendant. This case is entirely against the Office of Equal Opportunities Programs and associated officials. These officials are not members of the faculty of the UNM School of Medicine, nor are they "alter egos" of such individuals. By the very nature of the function fulfilled by the Office of Equal Opportunities Programs, that of investigating complaints of discrimination, it must enjoy significant autonomy and independence from any other entity within the university setting. There can be no substantial overlap between the interests of the university EOP office and the medical school when the functions and obligations of the two entities are so highly distinct and separated. The "identity of the parties" prong of the requirement for res judicata therefore

fails. *See, e.g.*, Satsky v. Paramount Communications. *Compare* Lowell Staats Mining Company, Inc. v. Philadelphia Electric Company, 878 F.2d 1271, 1274-1275 (10th Cir.1989) (Privity, for purposes of doctrine of res judicata and collateral estoppel, requires, at a minimum, substantial identity between issues in controversy and showing that parties in two actions are really and substantially in same interest.)

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE "PRIVITY" ALTERNATE REQUIREMENT FOR APPLICATION OF THE DOCTRINE OF RES JUDICATA ALSO FAILS

Privity, for purposes of the doctrine of res judicata and collateral estoppel, requires, at a minimum, a showing of substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in the same interest. Lowell Staats Mining Company, Inc. v. Philadelphia Electric Company. The district court's Memorandum Opinion and Order states that the Appellant "remain[s] tacit on the issue of privity." Memorandum Opinion and Order at 4, Appendix B, p. XI. This is completely contrary to the facts. Plaintiff stated in his Memorandum Brief in Support of Response to Defendants "Motion for Immediate Dismissal" that "there can be no substantial overlap between between the interests of the university EOP office and the medical school when the functions and obligations of the two entities are so highly distinct

and separated." Indeed, the role of the university EOP office is adjudicatory as regards complaint resolution. In fact, Defendants' arguments and the district court's conclusions that Plaintiff had 1) "all relevant facts at his command when he filed his November, 1995 complaint" (Memorandum Opinion and Order entered July 28, 1998, Appendix B, p. XIV) and 2) "a full and fair opportunity to litigate his claims in a prior suit, depend completely upon an assumption that the UNM EOP dispute resolution process was fair, impartial and free from the administrative control of the UNM Board of Regents or any other division of the university that might rely upon it. (Id. at p. XV)

If the district court's conclusion is not error and the Defendant in this case (UNM Office of Equal Opportunity Programs) is in privity with and the Defendant Board of Regents, the conclusion is inescapable that the Board of Regents has influence over the dispute resolution process and an interest in the outcome of this adversarial proceeding. Therefore, there can be no summary judgment that "all relevant facts" were discovered to support a "full and fair opportunity to litigate." If there was a full and fair opportunity to litigate, there is no privity. If there is privity, the information necessary to litigate is under the control of the Defendant and the Appellant is prevented from acquiring "all the relevant facts" necessary to a "full and fair opportunity to litigate." This "Catch 22" must support Dr. McGuinness in

the case at bar. The Appellant has from the outset concluded that there was no privity and assumed that the proceedings were unbiased and free from the unfair influence of the Defendant. The witnesses and the evidence dispute that conclusion. If the UNM EOP, the UNM School of Medicine and the UNM Board of Regents are in privity, it is in the sense that co-conspirators are in privity. This result cannot be countenanced by the law, and hence this alternate element for application of the docrtine of res judicata fails.

THE "IDENTITY OF THE ISSUES" REQUIREMENT FOR APPLICATION OF THE DOCTRINE OF RES JUDICATA FAILS

There is no identity of the issues between this case and the decision relied upon by the defense in advancing its arguments. The original decision by the trial court nowhere references the actions or omissions of the Office of Equal Opportunity Programs and its officials upon which the instant litigation is based. *See* Memorandum Opinion and Order Entered July 3, 1997, USDCNM No. 95-1434 MV/LFG, Appendix D. beginning at p. XXXI. Similarly, that opinion nowhere references claims of due process violation through failure to properly investigate a complaint, or retaliation for bringing a complaint, as are alleged in this case. Id. Finally, an ultimate determination that Plaintiff's condition does not fall within the ADA's definition of "disability" in no way diminishes the obligations of the defendants herein to conduct fair and impartial

inquiry into the Plaintiff's complaint and to refrain from retaliating against him for bringing that complaint. There is complete failure here on the part of the defendants to establish identity of the issues. More than separate legal theories of liability are involved here. There is near total separation as to specific dates, acts and omissions, evidence and proofs. *See* Clark v. Haas. Nothing in the case at bar was "necessarily decided" in connection with Judge Vázquez's decision or "necessary to support" that decision. *See* Robinson v. Volkswagenwerk AG, 56 F.3d at 1273, *citing* Restatement (Second) of Judgments, §27.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TWO CASES DO NOT FORM A "CONVENIENT TRIAL UNIT"

A third requirement for application of the doctrine of res judicata is that the second case form a "convenient trial unit" with the first, so that the two should have been litigated together. *See* Clark v. Haas Group, Inc., 953 F.2d at 1237,*citing* Restatement, Second, of Judgments, §24, comment b. Far from forming such a "convenient trial unit" with the first case, the case now before the Court involves issues so substantially distinct, and evidence and proof that have no bearing on the issues before the trial court in the first case, so that this requirement also fails.

The trial court's prior decision is limited to the duties of the University of New Mexico School of Medicine to provide reasonable accommodations to the Plaintiff for his own disability, and to refrain from discriminating against the Plaintiff by virtue of his son's disability. The instant case is based upon the duty to investigate Plaintiff's complaint and the duty to refrain from retaliatory actions against the Plaintiff as a result of his bringing that complaint. These duties and obligations are entirely distinct and separate from the matters litigated in the first case.

More than separate legal theories are involved here. The acts and omissions of the University of New Mexico Office of Equal Opportunities Programs involved in the instant case are separate in time, space and origin and motivational relationship from the acts and omissions of the UNM School of Medicine brought before the Court in the first case. The duties and obligations of the UNM Office of EOP are independent from the duties and obligations of the UNM School of Medicine, and are separate and distinct from any outcome in that case. The witnesses and proofs relevant to this case are also highly distinct, and if combined with the previous case, would form a cumbersome, unwieldy trial unit, creating difficulties for both the Court and the litigants. *See* King v. Union Oil, 117 F.3d at 445, *citing* Lowell Staats Mining Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271,

1274 (10th Cir. 1989, Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1239, 1335 (10th Cir. 1988, and Restatement (Second) of Judgments §24 (1982). This element of the requirements for res judicata therefore also fails.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THERE EXISTS HERE "A DEFICIENCY THAT WOULD UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE ORIGINAL PROCEEDINGS"

"The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." Richards v. Jefferson County, Alabama, 517 U.S. 793, 797, 116 S.Ct. 1761, 1765, 135 L.Ed.2d 76 (1996), *citing* Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48, 18 S.Ct. 18 [27], 42 L.Ed. 355 (1897).

In determining whether to apply the doctrine of res judicata, a Court must consider whether there exists "a deficiency that would undermine the fundamental fairness of the original proceedings." Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d at 1334. In making this determination, the significant inquiry is whether "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.' " Id. at 481, 102 S.Ct. at 1897 (quoting Montana v. United States, 440 U.S. 147,

164 n. 11, 99 S.Ct. 970, 979 n. 11, 59 L.Ed.2d 210 (1979)). *See also*, Phelps v. Hamilton, 122 F.3d 1309, 1322 (10th Cir. 1997); Griego v. Padilla, 64 F.3d 580, 584 (10th Cir. 1995); Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1196 (10th Cir. 1991); Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986). *Cf.* Louis Cook Plumbing & Heating, Inc. v. Frank Briscoe Co., 445 F.2d 1177, 1179 (10th Cir.1971) (refusing to bar through claim preclusion an action for labor and materials supplied in the performance of a construction subcontract when the plaintiff "was actually denied the right to litigate any issue in the prior action except Miller Act questions."). Multiple deficiencies in the prior litigation herein prevented the Appellant from fully and fairly litigating the issues he seeks to litigate in this case, and therefore preclude the application of res judicata to bar adjudication of those issues. *See* Haring v. Prosise, 462 U.S. 306, 317, 103 S.Ct. 2368, 2375, 76 L.Ed.2d 595 (1983), in which the High Court ruled:

> [P]etitioners maintain that Prosise should be barred from litigating an issue that was never raised, argued, or decided, simply because he had an opportunity to raise the issue in a previous proceeding. .... According to petitioners, such a federal rule of preclusion .... is necessary to further important interests in judicial

> administration. ... There is no justification for creating such an anomalous rule.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant the petition on writ of certiorari.

Respectfully Submitted:

Dennis W. Montoya
MONTOYA LAW OFFICES
Attorney for Petitioner
P.O. Box 15235
Rio Rancho, NM 87174-0235
(505) 246-8499
(505) 246-8599 (Facsimile)

Also:

1905 Lomas Boulevard, NW
Albuquerque, NM 87104

APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

(Cite as: 1999 WL 538667 (10th Cir.(N.M.)))

Kevin M. MCGUINNESS, Plaintiff-Appellant,
v.
REGENTS OF THE UNIVERSITY OF NEW MEXICO; University of New Mexico Office of Equal Opportunity Programs; University of New Mexico Affirmative Action Programs Committee; Mary Sue Coleman, individually and as Provost/Acting President of the University of New Mexico; Anne B. Thomas, individually and as Director, University of New Mexico Equal Opportunity Programs; Theresa V. Ramos, individually and as Assistant Equal Opportunity Specialist, University of New Mexico Equal Opportunity Programs; Thomasine P. Ross, individually and as Senior or Equal Opportunity Specialist, University of New Mexico Equal Opportunity Programs; Michael Fisher, individually and as Chair, University of New Mexico Affirmative Action Programs Committee Hearing panel; Maureen Sanders and Fred Perez, individually and as Members of the University of New Mexico Affirmative Action Programs Committee Hearing Panel and Unknown Members of the

University of New Mexico Affirmative Action Programs Committee, Defendants-Appellees.

No. 98-2224.

United States Court of Appeals, Tenth Circuit.

May 24, 1999.

BEFORE: PORFILIO, BRORBY, and MURPHY, Circuit Judges.

ORDER AND JUDGMENT [FN*]

MURPHY, Circuit J.

***1** Kevin M. McGuinness appeals the dismissal of his suit against the Regents of the University of New Mexico (UNM), UNM's Office of Equal Opportunity Programs, UNM's Affirmative Action Programs Committee, and various individuals employed by UNM. This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRMS.

This is McGuinness's third suit against UNM in his attempt to right the wrong he alleges he suffered when he was not allowed to proceed to his second-year of medical school at UNM. McGuinness was a first-year medical student at UNM's medical school in 1992. He was required to take a course in biochemistry. Unfortunately, McGuinness suffers from anxiety attacks when taking chemistry or math tests.

McGuinness discussed his anxiety with his professor, and he was told that if he achieved a 70% grade, he would pass the class. Because he did not receive a passing grade, he was required to take a make-up exam in order to pass the course. McGuinness refused. As a result, McGuinness was not permitted to proceed to his second-year of medical school.

On November 27, 1995, McGuinness filed suit in federal district court against UNM's Medical School, alleging violations of the ADA for failure to reasonably accommodate his test anxiety. (McGuinness I). [FN1] On August 29, 1996, McGuinness filed suit in state court against the Regents of UNM, alleging tort and contract claims, all based upon his dismissal from the medical school. (McGuinness II). [FN2]

On April 2, 1997, McGuinness filed this suit, alleging violations of the ADA and the Rehabilitation Act of 1973. (McGuinness III). Specifically, McGuinness asserted that UNM's Office of Equal Opportunity Programs (OEOP) ignored his complaints of discrimination, and when compelled to investigate them by the United States Department of Education, the OEOP performed only a cursory inquiry. McGuinness further alleged that the hearing panel which was convened to review the OEOP's determination denied him due process rights and retaliated against him for bringing his complaints.

The United States District Court for the District of New Mexico granted UNM's motion to dismiss on July

28, 1998, holding that the district court's grant of summary judgment for UNM in McGuinness I operated as claim preclusion.

On appeal, McGuinness asserts that the district court erred by: (1) concluding that there was privity between UNM's Medical School and the Regents of UNM; (2) determining that the two causes of action were the same; and (3) ignoring a deficiency which undermined the fundamental fairness of the original proceedings.

The district court found there to be privity between UNM's Medical School and UNM's Board of Regents because the management and control of UNM, including the Medical School, is vested in the Board of Regents by New Mexico statute. See Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1468-69 (10th Cir.1993) (stating that privity may be established if the "party to the first suit represented the interests of the party to the second suit" (quotation omitted)). The district court could find no independent status for the Medical School under New Mexico law, and McGuinness offers none on appeal.

***2** Applying the Restatement (Second) of Judgments' transactional approach, the district court also concluded that both suits arose from the same cause of action, namely, McGuinness's displeasure with being dismissed from UNM's Medical School. See Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1332-33 (10th Cir.1988) (adopting Restatement's transactional test).

Finally, noting that no procedural limitations were suffered by McGuinness in McGuinness I, the district court concluded that McGuinness was afforded a full and fair opportunity to litigate his case in the prior suit. See Sil- Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir.1990) (inquiring whether there were "significant procedural limitations in the prior proceeding" in determining whether the party had a full and fair opportunity to litigate).

After a de novo review of the parties' briefs and contentions, the district court order, and the entire record on appeal, this court finds no reversible error and affirms for substantially the same reasons set forth in the district court's Order Granting Motion for Dismissal. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

FN1. The district court granted summary judgment for UNM because McGuinness had not proved that he was disabled under the ADA. McGuinness appealed, and this court affirmed, holding that McGuinness was not disabled under the ADA and the accommodation McGuinness sought was not reasonable. See

McGuinness v. University of N.M. Sch. of Med., 170 F.3d 974, 978-80 (10th Cir.1998).

FN2. The District Court of Bernalillo County had granted summary judgment for UNM because McGuinness's claims were barred by the statutes of limitations. McGuinness appealed, and the Court of Appeals for the State of New Mexico affirmed. See McGuinness v. Regents of the Univ. of N.M., No. 19,066 (N.M.Ct.App. Dec. 30 1998).

APPENDIX B: MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

KEVIN M. McGUINNESS,

Plaintiff,

vs. No. CIV 97-437 MV/LCS

REGENTS OF THE UNIVERSITY
OF NEW MEXICO, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion for Immediate Dismissal, filed August 5, 1997 [Doc. No. 111. The Court, having reviewed the responsive pleadings, relevant law, and being otherwise My informed, finds that the motion is well taken and will be granted.

Background

Although there is some dispute on whether Mr. McGuinness ceased being a student at the University of New Mexico Medical School of his own accord,

Mr. McGuinness, in a prior action in this Court, sued the medical school for alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101, on November 27, 1995, claiming that the school refused to accommodate his test anxiety disability and failed to promote him past his first year as a student. This Court, in response to a summary judgment motion, dismissed Mr. McGuinness' 1995 action with prejudice, holding that Mr. McGuinness was neither an employee of the medical school nor entitled, under the circumstances of his case, to the protection of the ADA- Mr McGuinness has appealed this ruling.

Mr. McGuinness now directs his attention not to the medical school, but to the University's equal opportunity programs and some of its constituent members. Defendants here were involved in Mr. McGuinness' administrative appeal of his dismissal. In the present complaint, filed April 2, 1997, Mr. McGuinness alleges that the Office of Equal Opportunity Programs ignored his complaints of discrimination, and when compelled to investigate them by the United States Department of Education only performed a cursory inquiry, failing to interview his witnesses and ultimately exonerating the medical school from any discriminatory action in a November 30, 1994 letter of determination. Mr. McGuinness further alleges that the hearing panel convened to review this determination denied him due process rights, and that Defendants retaliated against him for bringing his complaints. The University's Office of Equal Opportunity Programs and Affirmative Action Programs Committee Hearing Panel upheld the finding

of the letter of determination on March 30, 1995. On April 14, 1995, the acting president of the University refused to upset this outcome.

Defendants respond by denying Mr. McGuinness' substantive allegations and claiming that res judicata flowing from the first litigation prevents the present one from continuing.

Discussion

In ruling on this motion, the Court considers all facts Mr. McGuinness has averred as true and construes them in a light most favorable to the plaintiff, Fuller v. Norton, 86 F.3d 1016, 1020 (10th Cir.1996), for although Defendants have not specifically invoked Rule 12(b)(6), Defendants filed their motion at an early stage in the proceeding and have sought dismissal, making this posture appropriate.

Because the prior action was one in federal court involving federal law, the Court applies federal principles of res judicata. Valley Improvement Association, Inc, v. United States Fidelity and Guarantee Corp., 129 F.3d 1108, 1120 (10th Cir. 1997); Petromanagement Corp. v. Acme-Joint Venture, 835 F.2d 1329, 1332-33 (10th Cir. 1988). Intended to relieve parties of the costs and vexation of multiple litigation, Satsky v. Paramount Co , Inc., 7 F. 3d 1464, 1467 (10th Cir. 1993), and "to secure the peace and repose of society by the settlement of matters capable of judicial determination," Southern Pacific R. Co. v. United States, 168 U.S. 1, 49 (1897), res judicata

"requires the satisfaction of four elements: (1) the prior suit must have ended with a [final] judgment on the merits; (2) the parties must be identical or in privity (3) the [present] suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit." Nwosun v. General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10th Cir. 1997), cert. denied, 118 S.Ct. 1396 (1998).

While Mr. McGuinness argues otherwise, he can not escape the conclusion that the Court's dismissal with prejudice of his 1995 action constitutes a final judgment on the merits. See Clark v. Haas Group, Inc., 953 F.2d 1235,1238 (10th Cir. 1992), cert. denied, 506 U.S. 832 (1992). Mr. McGuinness relies on the fact that he has appealed the prior judgment to evade the finality element, yet it is hornbook law that an appeal will not normally affect preclusion. 18 Moore's Federal Practice § 131.30[2][c] (1998). Mr. McGuinness has offered nothing else that would cause the Court to deviate from this rule. The first element, therefore, is met.

The second requirement, that the parties be identical or in privity, also is met here. Defendants suggest, by citing to New Mexico law, that although Mr. McGuinness only sued the medical school in 1995 and now sues the Regents and various other officials or entities, Mr. McGuinness has in both instances sued the same party, the University of New Mexico. Defendants also argue that the medical school can not, under New Mexico law, be considered separately from the Regents of the University and that the medical

school and the Regents are in privity. Mr. McGuinness, remaining tacit on the issue of privity, replies that there is no identity of the parties between the first and second litigation, because in the present litigation he does not seek recovery against the medical school, and explains that this case is entirely against the Office of Equal Opportunity Programs and associated officials.

Without deciding whether a suit against the medical school is identical to a suit against the University, as Defendants allege, the Court finds that at a minimum privity exists between the medical school and Defendants. The existence of privity depends on case by case analysis, for "[t]here is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel." Satsky, 7 F.3d at 1468. Rather, "privity depends upon the circumstances, ... [and]... may be established if the party to the first suit represented the interests of the party to the second suit." Id. at 1469 (citations omitted); *see also* Lowell Staats Mining Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271, 1274-75 (10th Cir. 1989); Rex v. Manufactured Housing Committee of State of New Mexico, 892 P.2d 947,954 (N.M. 1995). Under New Mexico law, the management and control of the University of New Mexico is vested in a board of regents. N.M. Stat. Ann. § 21-7-3 (Michie 1996). Such control necessarily includes control of mandated departments of the University, including the medical school and other departments. Id. § 21-7-8. The board constitutes a body corporate which has the right of

suing and being sued. Id. § 21-7-4. The Court has not found, in New Mexico law, an independent status for the medical school. Against these indicia demonstrating that the medical school substantially represented the interests of the Regents and their agents, Mr. McGuinness only argues that the Office of Equal Opportunities Programs, by virtue of its responsibility to investigate discrimination complaints, must enjoy significant autonomy and independence from any other entity within the university setting. While this may be desirable policy and reflect the operations of that office, it does not detract from the persuasive showing of the Regents' broad powers and responsibilities. The Court concludes, therefore, that privity exists between the University of New Mexico Medical School, the named party in the 1995 litigation, and Defendants here.

Defendants also have demonstrated that the third requirement for res judicata, that the prior suit be based on the same cause of action, is met. The Nwosun court recently reaffirmed that the Tenth Circuit "embraces the transactional approach to the definition of 'cause of action.'" Nwosun, 124 F.3d at 1257, citing Petromanagement 835 F.2d at 1335. With this approach, "a cause of action includes all claim or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." Nwosun, 124 F.3d at 1257. To determine what constitutes a transaction, event, or occurrence the

Tenth Circuit has relied heavily on the Restatement (Second) of Judgments:

> What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be. determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation... The expression 'transaction, or series of connected transactions,' is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. And underlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim. Petromanagement 835 F.2d at 1335, Quoting Restatement § 24 and commentary. Applying this standard to the facts now before the Court shows that Mr. McGuinness here has alleged the same cause of action as in the 1995 litigation.

At the root of Mr. McGuinness' displeasure is his dismissal from the University of New Mexico Medical School. The school's failure to promote him past the first year of study, despite his informing them

of his alleged disability and maintaining that he met the qualifications for promotion, led him to complain to the Office of Equal Opportunity Programs. That office's handling of his claim, and its final determination, also aggrieves Mr. McGuinness. Had this determination been favorable to Mr McGuinness, the medical school would have promoted him to second year status. It is clear, therefore, that the events complained of are so related in time, space, and origin to constitute a transaction for purposes of res judicata.1[1]

Mr. McGuinness strenuously argues against this conclusion, claiming that whereas the first suit involved action by the medical school, the present litigation focuses on discrimination and retaliation by the equal opportunity office and appellate panel. Such minute parsing of claims can not allow Mr. McGuinness to prevail, because to allow this claim splitting would encourage piecemeal litigation.

Moreover, the Court is mindful that Mr. McGuinness had all relevant facts at his command when he filed his November, 1995 complaint, and

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[1] Mr. McGuinness makes much of his discovery, in July, 1997 of an alleged alteration of his academic records, charging that such alteration was retaliatory. The Court has already denied Mr. McGuinness' motion to amend his complaint to include this allegation, however, thus making it moot for purposes of this motion.

ample time to consider the totality of the circumstances of his dismissal. By then final action on the part of the University was seven months old. Discovery in the 1995 action, originally scheduled to end on June 14, 1996, was extended to July 15, 1996. Mr. McGuinness'changing attorneys some six months after the filing of the complaint afforded a new look at the case as filed. There was nothing preventing Mr. McGuinness, then, from moving to amend his original complaint to include Defendants then who are here now.

These facts make even more compelling the application of the rule that res judicata should be a bar to claims that could have been brought in the first litigation. See Brown v. Felsen, 442 U.S. 127, 131 (1979); Clark, 953 F.2d at 1238. In striking the delicate balance between the interests of Mr. McGuinness and the interests of Defendants, the Court concludes that this litigation is needlessly duplicative, for Mr. McGuinness could have brought the parties he now sues into his first litigation. That he did not do so through oversight or tactical choice can not now inure to his benefit and to the detriment of the University, who must once again enter the fray to defend itself.

The Court also concludes that Mr. McGuinness had a full and fair opportunity to litigate his claims in the prior suit. In examining this last element, the Court focuses on fundamental fairness, guided by a sense of justice and equity, Sil-Flo, Inc. v. SHFC Inc., 917 F.2d 1507, 1521 (10th Cir. 1990), citing Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S.

313, 334 (1971), and looking to "whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." Sil-Flo, 917 F.2d at 1521.

The record of the 1995 action reveals no procedural limitations. The medical school moved for summary judgment several weeks after the close of an unremarkable, yet acrimonious, discovery. Discovery violations which Mr. McGuinness' counsel may have engaged in during this first litigation became moot after the Court's dismissal. In addition, Mr. McGuinness, seeking reinstatement to the medical school along with damages, had every incentive to litigate all issues surrounding his dismissal expeditiously. Finally, since all dismissal proceedings against Mr. McGuinness had been, by the time of his filing of the 1995 complaint, concluded for several months, effective litigation could not have been limited by the nature of his relationship with the medical school or other university agencies.

THEREFORE,

IT IS HEREBY ORDERED, that Defendants' Motion for Immediate Dismissal, filed August 5, 1997 [Doe. No. 111 be, and hereby is, granted.

IT IS FURTHER ORDERED that this entire action be, and hereby is, **dismissed with prejudice**

MARTHA VÁZQUEZ
UNITED STATES
DISTRICT JUDGE

July 28, 1998

Counsel for Plaintiff
Dennis W. Montoya, Esq.

Counsel for Defendants
Paul M. Schneider, Esq.
Paul R. Ritzma, Esq.

APPENDIX C: FINDING OF THE UNITED STATES DEPARTMENT OF EDUCATION THAT PETITIONER HAD BEEN DISCRIMINATED AGAINST BY THE UNIVERSITY OF NEW MEXICO

DEPARTMENT of EDUCATION

AUG 19 1994

Re: **08942026**

Dr. Kevin McGuinness
5903 Aspen Avenue, N.E.
Albuquerque, New Mexico 87110

Dear Dr. McGuinness:

This letter is to notify you of the determination of the U. S. Department of Education, Office for Civil Rights (OCR) regarding the resolution of the above-referenced complaint. You alleged that the University of New Mexico (UNM) discriminated against you in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation at 34 Code of Federal. Regulations (C.F.R.), Part 104; and Title II of the Americans with Disabilities Act of 1990 (Title 11), 42 U.S.C. §§12131-12161, and its implementing regulation at 28 C.F.R., Part 35, which prohibit discrimination on the basis of disability in any program or activity receiving Federal financial assistance from

the U.S. Department of Education. The District receives Federal financial assistance and is, therefore, subject to the requirements of Section 504 and Title II.

In particular, you alleged that UNM discriminated against you on the basis of disability by

1. Refusing to provide you a requested academic adjustment for Basic Biochemistry;

2. Awarding you a lower grade in Basic Biochemistry than you had earned; and

3. Refusing to consider your complaint made with UNM's Equal Opportunity Programs (EOP).

In reaching a determination on this complaint, OCR reviewed records and documents pertinent to the issues in the complaint. OCR also conducted interviews with you, UNM faculty and staff I and other individuals named by you or UNM. As a result of our investigation, OCR has made the following determinations of fact:

ISSUES ONE & TWO: ACADEMIC ADJUSTMENT & GRADING

- In August 1992, you enrolled in UNM's School of Medicine. You took Biochemistry during the fall of 1992. You have an anxiety disorder which, according to a clinical psychologist, is a disorder that substantially limits your ability to learn and achieve academically. Therefore, OCR concluded that you are a student with a disability who is qualified under Section 504 and Title II.

- UNM has policies and procedures which address provision of special services to students with disabilities which are published in booklets available to staff, faculty and students. UNM's student handbook, Pathfinder, refers students to the appropriate publication for more information on obtaining special services.

- The student must request consideration for eligibility as a student with a disability before the student can be qualified to receive accommodation (including academic adjustments). Eligibility as a student with a learning" disability is determined by UNM's Educational Diagnostic Unit.

- UNM's Educational Diagnostic Unit prepares a memo summarizing the student's learning difficulties and offering general suggestions for helping the student in the classroom. It is the

student's responsibility to present the memo to the instructor early in the semester.

- Medical students also receive a publication entitled "Counseling Pathfinder," which provides information on services available through UNM's Student Health Center. In addition, the School of Medicine has a clinical psychologist, the Director of Biomedical Communications, who counsels students on learning disabilities and test anxiety.

- According to witness testimony and affidavits, School of Medicine faculty were not aware of your disability prior to your assignment of a marginal grade in biochemistry.

- According to witness testimony and affidavits, you did not request an academic adjustment (modification to make-up exam format or change in marginal grade) to accommodate your disability. You did not make such a request unofficially of School of Medicine faculty, or officially through Disabled Student Services.

- According to you, correspondence written by you and your attorney (during the Steering Committee's consideration of your grievance), witness testimony and affidavits, you did contest your marginal grade bef ore the School of Medicine Steering Committee I, pursuant to the "UNM Student Standards and Grievance Procedure," as a grading policy issue. Your disability was not raised as an issue in that grievance.

- School of Medicine personnel, including Steering Committee I members, provided you with modifications in examination formats on three make-up exam opportunities afforded you in a separate course, Cardiovascular/Pulmonary I, in which you initially received a grade of unsatisfactory. School of Medicine policy on promotion as published in the student handbook requires that a student receiving a grade of unsatisfactory or marginal must be provided at least one and a maximum of two opportunities for makeup. Modifications were provided even though no request was made for an academic adjustment needed because of a disability.

The regulation implementing Title II at 28 C.F.R. S 35.130 provides that UNM shall not discriminate against a qualified individual with a disability, or provide such an individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result as the aid, benefit, or service provided to others. UNM must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless UNM can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Section 504 at 34 C.F.R. §§ 104.43(a) and 104.44(a) provides that UNM shall not subject qualified students with disabilities to discrimination under any academic

programs to which Section 504 applies. Further, UNM shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate on the basis of disability against qualified individuals with disabilities. Academic requirements that UNM can demonstrate are essential to the program of instruction being pursued will not be regarded as discriminatory within the meaning of Section 504.

Conclusion:

OCR concluded that there is insufficient evidence to support your allegations that you were assigned a lower grade than you earned in Basic Biochemistry because of your disability, and that you were denied academic adjustment for your disability. There is no evidence that UNM personnel were aware of your disability prior to assignment of your Basic Biochemistry grade. There is no evidence that you ever requested any academic adjustment, either formally or informally, to accommodate your disability. Therefore, OCR has determined that the evidence is insufficient to support a finding of a violation of Section 504 or Title II in this regard.

ISSUE THREE: GRIEVANCE PROCEDURE,

- UNM has adopted a procedure entitled "Discrimination Complaint Procedure, 11 signed by President Richard Peck on April 29, 1993, that provides for prompt and equitable resolution of

complaints alleging violations of Section 504 and Title II.

- Under Article 3. Formal Action, 3.4 Jurisdiction, Section 3. 4. 1, 11 [Equal Opportunity Programs (EOP)] wi 11 determine through processing the intake form(s) whether this Discrimination Complaint, Procedure is applicable; if not, EOP shall refer the complainant to the appropriate University process, if any." There are no time frames for completion of review of the intake form.

- Article 3. Formal Action, Section 3.5 Preliminary Resolution Process for Academic Disputes, provides:

  If the complainant is a student and the complaint alleges that he or she has been discriminated against or sexually harassed in connection with academic evaluation, including . . . grades, . . . the preliminary resolution process set forth in this section shall be followed unless the respondent is willing to sign a statement expressly waiving this process.

  The process described in the section provides that if resolution is not achieved at the preliminary stage, the complainant may initiate further processing of the complaint as described in subsequent sections of the procedure.

- Under Article 3. Formal Action, the complaint may be resolved through settlement/conciliation efforts

(prior to investigation), or investigation to include a formal memorandum of findings, issuance of a report prepared by EOP, and attempts to negotiate a conciliation agreement (when the report concludes that discrimination/ sexual harassment occurred) . If no conciliation is accomplished or attempted, notice is provided to both parties of their right to continue the formal action, along with an explanation of the appeal procedures. Appropriate time frames are incorporated throughout Article 3. Formal Action.

- UNM's procedures include appropriate due process provisions, including appeal of EOP's jurisdiction decision as provided under Section 3.4.3. Following an appeal by either party, jurisdiction is decided by the Vice President for Academic Affairs, the Vice President for Student Affairs, and the Director of Human Resources. The University Counsel (or designee) participates as a nonvoting member.

- On November 1, 1993, you completed an Intake Questionnaire and returned it to the University's Equal Opportunity Programs (EOP) alleging discrimination on the basis of disability. EOP determined that it lacked jurisdiction over your grievance concluding that your allegation focused on a grading dispute only, and not on alleged discrimination on the basis of disability. The first notice of this determination was provided to you in writing in a memorandum dated November 16, 1993.

- As requested in a telephone conversation with EOP on November 19, 1993, at 9:43 a.m., you submitted additional information on December 6, 1993, to clarify your allegations. Materials submitted included a copy of the complaint filed with OCR and a "Title II of the Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973 Discrimination complaint Form" filed with the U.S. Department of Justice.

- EOP officials stated that information submitted by you did not indicate that you were making a discrimination complaint based on disability. Specifically, they deny that you indicated to them, either through the materials submitted or conversations, that you felt that you were assigned a lower grade than you earned because of your disability.

- Records of a telephone conversation with you on November 19, 1994, at 9:43 a.m. state "no problems until he told professor about his disability."

- Materials submitted to EOP by you on December 6, 1993, state:

  Despite earning a final average of 70.4% I was assigned a grade of Marginal . . . Despite a request (when I was told my final average was 69% or less) for a reasonable accommodation such as an appropriate alternative to the traditional

examination process, I was refused . . . While I originally thought the Marginal grade was a benign error, the actions of the Dean, Assistant Dean for Undergraduate Education, the Steering Committee, the Department Chair, and the course Professor strongly suggest a pattern of intentional prejudicial discrimination which is severely harmful.

- EOP's Intake Assessment form dated December 7, 1993, states:

(KM's) allegations of discrimination are directly connected to the grading method. He states that his combined scores for the biochemistry course are 70.4%, which correlates to an overall grade of SATISFACTORY. However, the professor allegedly failed to combine/average his scores (because of his disability) and instead compared each of his individual scores to the remainder of the class and then assigned him an overall score of 69% or less ([School of Medicine (SOM)] refuses to tell him his precise score). Even if we accept a complaint from the student, I don't see how we can extract the information necessary to prove how the scores were calculated. Even if we do, how do we establish a connection between the scoring method and his disability. He advised the professor of his disability, but he never requested any accommodations (of any kind).

- According to UNM's Discrimination Complaint Procedures (Section 3.5) students' complaints alleging discrimination or sexual harassment in connection with academic evaluation, including

grades, should be processed under the preliminary resolution procedure. If preliminary resolution is unsuccessful, further processing of the complaint is provided as described in subsequent sections which provide for investigation, preparation of a memorandum of findings, and issuance of a report by EOP.

- Your grievance was not accepted by EOP at the intake stage after three submissions of information by you because EOP determined that it lacked jurisdiction. No investigation was conducted, and you were not afforded an appeal of the decision.

- The Discrimination Complaint Procedure provides appeal of EOP's jurisdiction decision if a party challenges the decision. In such a case, jurisdiction is decided by the Vice President for Academic Affairs, the Vice President for Student Affairs, and the Director of Human Resources; the University Counsel (or designee) participates as a nonvoting member.

The regulations implementing Title II at 28 C.F.R. § 35.107(a) and (b), and section 504 at 34 C.F.R. §104.7(a) and (b), provide that UNM designate at least one employee to coordinate its efforts to comply with the requirements of the regulations. In addition, UNM must adopt and publish grievance procedures that incorporate appropriate due process standards, and that provide for prompt and equitable resolution of complaints alleging violation of the regulations.

Conclusion:

OCR found that UNM has adopted grievance procedures that provide for prompt equitable resolution of complaints alleging violations of Section 504 and Title II, but UNM did not follow its procedures in handling your complaint. UNM's EOP office decided that it lacked jurisdiction over your complaint because it raised an academic dispute over a grading issue. However, OCR concluded that EOP had sufficient information to infer that you were complaining of discrimination on the basis of disability.

Specifically, EOP should have been able to deduce that you were alleging that you had been assigned a lower grade than you earned because of your disability. Further, records of a telephone conversation with you on November 19, 1993, and an intake assessment form completed on December 7, 1993, and reviewed on December 8, 1993, indicate that EOP personnel were drawing such a conclusion. Additionally, while comments on the intake form reflect a basic understanding of your allegation, the comments also indicate that your complaint was rejected because the investigation necessary to prove your allegation would have been too difficult to conduct.

UNM's procedures provide that if a complaint includes allegations that a student has been discriminated against in connection with academic evaluation, including grading, the Discrimination Complaint Procedure at Section 3.5, and the following sections, are to be applied. OCR also found that you were not

afforded the right to appeal EOP's jurisdiction decision as provided by the Discrimination Complaint Procedure. Consequently, OCR finds that UNM discriminated against you on the basis of disability by refusing to consider your discrimination complaint made with UNM's Equal opportunity Programs (EOP), and for failing to provide you with an appeal of EOP's jurisdiction decision. Therefore, UNM is in violation of 34 C.F.R. § 104.7(b) . To address the cited violation, UNM has agreed to undertake the actions stipulated in the attached Agreement for Corrective Action. Implementation of the Agreement will be monitored by OCR.

We are closing this case effective the date of this letter. This letter addresses only the issues discussed above and should not be interpreted as a determination of UNM's compliance or noncompliance with Section 504 or Title II in any other respect.

If you have any questions regarding the disposition of your case, please submit them to this Office in writing within 30 days of receipt of this letter. Please reference the case docket number in your correspondence.

Sincerely,

Linda Howard-Kurent
Branch Chief-B
Compliance Enforcement Division I

Enclosure: Agreement for Corrective Action

APPENDIX D: Memorandum Opinion and Order Entered July 3, 1997, USDCNM No. 95-1434 MV/LFG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

KEVIN McGUINNESS,

Plaintiff,

vs. NO. CIV 95-1434
MV/LFG

UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment [#27], filed August 26, 1996 and Plaintiff's Counter-Motion for Summary Judgment, [#40] filed September 16, 1996.

Plaintiff's Complaint seeks compensatory and punitive damages and reinstatement in the University of New Mexico School of Medicine as a full-time second-year medical student. The

Complaint is based solely on alleged violations of the Americans with Disabilities Act, 42 U.S.C. Section 12101 *et seq.* (the "ADA"). Both Plaintiff and Defendant agree that there are no genuine issues of material fact that would preclude summary judgment.

Undisputed facts- Plaintiff has a bachelor of science degree in chemistry and biology, a degree in physiological psychology, and a doctoral degree in clinical psychology Although Plaintiff experienced some difficulty in achieving success in chemistry and math in undergraduate school and self-diagnosed his problem as test anxiety disorder in graduate school, he "developed techniques for overcoming the obstacles within the academic program that focuses on understanding the academic'-requirements before [he] started the course and developing study habits to allow me to achieve the standard, just like everybody else in the class." [Def. :Ex. 6] He worked for over five years as a chemist and has been working as a clinical psychologist while enrolled in medical school. Plaintiff was admitted to medical school in 1992. The professors explained the written grading policy to the students at the beginning of each course. This policy is as follows:

> 'The final grade for the block will be determined entirely by the combined scores received on the four examinations together with points

> received for the case study tutorials. It is expected that overall averages of about 90%, 80% and 70% will correspond to block grades of OUTSTANDING, GOOD, AND SATISFACTORY, respectively. An overall average below 65% will almost certainly be UNSATISFACTORY. **Averages above 65%** will be evaluated in detail to determine if the student is to receive a grade of MARGINAL or SATISFACTORY. (Emphasis added.)

The word "about" in the above policy provided for discretion and. flexibility in awarding grades, and the professors based their decision on whether to award a grade of "marginal" or "satisfactory" on two other factors besides the overall averages: "natural breaks or clusters" apparent in student performance levels during the particular semester, and the individual student's score on the final, comprehensive examination. Plaintiff alleges that by reading the grading policy, he ascertained that there would be no "curve" built into the grading system for the biochemistry block except for the evaluation between "marginal" and "unsatisfactory" grades. His complaint centers on the fact that these other two factors were considered when his final average in biochemistry was 70%.

During his first course in biochemistry, Plaintiff approached one of his professors, Dr. Reyes, and told him about his test anxiety and his difficulty in demonstrating on exams what he had learned. He told Dr. Reyes that he needed for Dr. Reyes not to "deviate from their grading policy ... and [asked] that [he] not be labeled as lazy by Dr. Reyes, because [he] would not be able to perform at the same level on his course tests as [he] was able to on all of the other tests." [Def. Ex. 6] Plaintiff indicated to Dr. Reyes that he *needed no accommodation for test-taking." [Def. Ex. 6] Plaintiffs scores on his first three exams were 70%, 70%, and 66%. He scored an 84% on his tutorial and 69% on the final exam. His overall average was 70%. Because the lowest average above Plaintiff's was a 73.5 % and that student had made a 77 % on the final exam, and two other students had averages of 69% and 70%, Plaintiff's average represented the top score of a "natural break or cluster" between "satisfactory" and "marginal". Because his grade on the final exam was only "marginal", the biochemistry professors unanimously agreed that Plaintiff should be awarded a "marginal" grade. It is uncontroverted that Plaintiff was given the option of retaking the biochemistry final exam, but he refused to do so, arguing that his average of 70% conclusively established that he had the right to receive a "satisfactory" grade.

In order to be promoted to the second-year of medical school, students had to obtain at least a

"satisfactory" grade in either the cardiovascular/pulmonary or biochemistry block. Plaintiff initially received an "unsatisfactory" grade in the cardiovascular/pulmonary block the semester after he took biochemistry, but after taking three make-up exams, was finally awarded a "marginal" score for that block. Because he had not met the requirement of receiving a "satisfactory" grade in one of the two blocks and refused to take a make-up in biochemistry, the medical school gave Plaintiff the option of applying to repeat the first-year courses or being dismissed from medical school. Plaintiff chose not to apply to repeat the courses and filed suit.

Plaintiff is not disabled for purposes of the ADA. Section 12132 of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. "

The term 'disability' means, with respect to an individual--(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as

having such an impairment. 42 U.S.C.§ 12102(2). Courts have held that this language indicates that there must be a substantial limitation on a major life activity, and that the impairment must be significant. Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986). Impairments that are minor and whose relative severity is widely shared do not fall within the statute's definition. Id- at 934. Regulations of the Equal Employment Opportunity Commission have been issued to implement the ADA. See 29 C. F.R. Pt. 1630; Bolton v. Scrivner, 36 F. 3d 939, 942 (10th Cir. 1994). cert denied, 115 S. Ct. 1104 (1995). Further, "[t]he legislative history of the ADA indicates that 'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.'" Id- at 943 (citations omitted). The EEOC has defined "major life activities" to include "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1613.702(C). Under the EEOC regulations, to demonstrate that an impairment "substantially limits" the major life activity of working, for example, an individual must show "significant[restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Id., §1630.2(3)(i). "The inability to perform a single, particular job does not constitute

a substantial limitation in the major life activity of working." Id.

Plaintiff asserts that he qualifies for protection under the ADA because he suffers from a test anxiety disorder related to learning in the specific subject areas of chemistry and mathematics that substantially limits a major life activity. This "major life activity" is rather hazily defined by Plaintiff in his response to the motion for summary judgment as an ability to demonstrate his competence in these subject areas in examination settings. Three factors that should be considered when determining whether an impairment substantially limits a major life activity are: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. " Id., §1630.20(2). Plaintiff's "impairment" of feeling test anxiety in two discrete subject matters that do not require special accommodations in testing situations is neither significant nor severe. Plaintiff has demonstrated that he can overcome this "impairment" simply by studying harder and longer than other individuals have to. Although it is probable that his problem with test anxiety in chemistry and math will be life-long, there has been no permanent 'impact resulting from the impairment that has prevented him from getting a degree in chemistry and psychology or from obtaining extremely profitable employment. See

Plaintiff's First Supplemental Initial Disclosures, attached as Def's Ex 2; see also Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992) ("While the [Rehabilitation Act] regulations define a major life activity to include working, this does not necessarily mean working at the job of one's choice."); Jasany v. United States Postal Serv. 755 F.2d 1244, 1248 (6th Cir. 1985) (stating that an impairment that interferes with an individual's ability to do a particular job but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not substantially limiting within the meaning of the statute). Under Plaintiff's asserted facts. had he simply known that he needed to pass his final exam with at least a 70 or 71 score and obtain at least a 72 or 73 as a final average, he could have done so without special accommodation from the medical school; thus it is clear that his "impairment" does not permanently or significantly impact any major life activity. Plaintiff's inability to pass a specific type of exam absent an awareness of the exact score that he had to obtain in order to pass is not a substantial limitation to a major life activity.

Contrary to Plaintiff's assertions, In Re Petition of Rubenstein, 637 A. 2d 113 1 (Del. 1994), is not on point. There, the plaintiff was diagnosed with a learning disability that required accommodations, id- at 1137, not with a condition that only manifests itself under particular circumstances and has an impact that can be diminished without accommodation.

"The burden is on the plaintiff to establish the existence of an impairment that substantially limits a major life activity as an element of the plaintiff's prima facie case. If the plaintiff fails to establish a prima facie case, it is unnecessary to address the question of reasonable accommodation." Jasany, 755 F.2d at 124~1-50. Plaintiff has failed to establish-'the existence of an impairment that substantially limits a major life activity, thus the Court need -' not address the question of accommodation. The Court notes, however, that it is undisputed that Plaintiff never requested an accommodation before he took any exam and in fact declined the professors' offers of extended time for test taking. This fact further distinguishes Rubenstein, supra_because in that case the plaintiff had requested additional time before taking an exam but was refused the accommodation. 637 A.2d at 1133.

Plaintiff has not stated facts to support a cause, of action under 42 U.S.C. 12112(b)(4). Plaintiff alleges that the Medical School denied him the accommodation of changing his biochemistry grade to *satisfactory" because his son has cerebral palsy, claiming protection under Section 12112(b)(4). That section, however, relates specifically to employment discrimination and is not applicable to general denial of benefits or programs cases. Although Plaintiff claims that he had to carry malpractice insurance and take the federal employee's oath, he is not an

"employee" of the Medical School such that he may claim protection under this Section and his complaint does not pertain to any aspect of employment. Even if he could claim such status, Plaintiff points only to a letter that he sent to one of his, biochemistry professors informing him that he had a son with cerebral palsy and the fact that one of the members of the steering committee knew this fact as evidence of that claim. The letter was sent after the professors had unanimously decided not to change their initial assessment of Plaintiffs performance; there is absolutely no evidence that any of the professors who determined Plaintiff's final grade knew that he had a son with cerebral palsy before that time, much less that they considered that fact when determining his grade. Further, Plaintiff has failed to present evidence that he has been denied the opportunity to continue his medical school training. The medical school offered him an opportunity to retake the biochemistry exam and allowed extra time for him to do so, but he refused. After his refusal, it allowed him to apply to retake the course; it was his choice to refuse these opportunities and discontinue his medical training.

THEREFORE,

IT IS ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**; Plaintiff's Cross-Motion for Summary Judgment is

DENIED; and Plaintiffs complaint is hereby **DISMISSED** with prejudice.

MARTHA VAZQUEZ
U.S. DISTRICT COURT
JUDGE